

THE IMPORTANCE OF COMBINATIONS OF UNBUNDLED NETWORK ELEMENTS

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THE KEY TO SUSTAINABLE COMPETITION

- Facility-based competitors offer the greatest potential to deliver sustainable, differentiated local competitive choice to American consumers.
- Since passage of the '96 Telecom Act, facilities-based new entrants have raised approximately \$18 billion to invest in the provision of local exchange services.
- Because of the cost and time involved in building out facilities to reach a large number of customers, the use of combinations facilitates quicker initial local market entry by new entrants.
- Consumers are thus able to obtain a greater choice of carriers more quickly through the use of combinations of UNEs and carriers' facilities.

USE OF COMBINATIONS BY FACILITIES-BASED NEW ENTRANTS

- Facilities-based providers may use combinations to fill in their networks.
- For example, extended links (i.e. unbundled loops combined with transport) allows a facilities-based new entrant to gain access to unbundled loops from an ILEC's central office in which the new entrant is not collocated.
- Under the guidance of the New York Commission, Bell Atlantic in its pre-filing statement in New York has committed to provide extended links to competitors in New York.
- An ALJ has recommended in a recent arbitration decision that the Pennsylvania PUC order Bell Atlantic to provide extended links to NEXTLINK in Pennsylvania.

STATUTORY, REGULATORY AND JUDICIAL AUTHORITY RE: COMBINATIONS

- Section 253(c)(3) requires ILECs to allow new entrants to purchase, on an unbundled basis, separate elements of the ILEC's network at just, reasonable and non-discriminatory rates, terms and conditions and based on cost; this provision was intended to permit facilities-based competitors to "fill in" portions of their networks with individual or combined network elements rather than to act as a lower-priced substitute for ILEC resold services.
- Section 254(c)(4) requires ILECs to offer new entrants their retail exchange services at wholesale rates.

- The FCC adopted rules implementing Section 253(c)(3) under which new entrants could order any combination of unbundled network elements, including combinations essentially identical to resold services.
- Subsequent FCC orders indicated that ILEC's provision of certain existing combinations that replicate resold services should be priced at cost (i.e. below the price scheme established by congress for resold services per 254(c)(4)).
- The 8th Circuit subsequently ruled that the FCC could not require the provisioning of already combined elements which resemble resold services at cost-based rates because this would obliterate the distinctions that Congress made between access to unbundled network elements under Section 253(c)(3) and the purchase at wholesale rates of an ILEC's retail services for resale under Section 253(c)(4).
- RBOCs have misconstrued the 8th Circuit decision to mean that they do not have to provide at cost-based rates any combination of unbundled network elements, including those that are not functionally equivalent to resold services.

- **ALTS has asked the Supreme Court to rule that the 8th Circuit's opinion (striking down the requirement that ILECs recombine network elements at cost-based rates) applies only to combinations that replicate resold services and not to any of the many other combinations of network elements that do not replicate resold services.**

STATUTORY DISTINCTION BETWEEN UNES AND RESALE

- Congress has made a critical distinction between access to UNEs at cost to fill in a facilities-based competitor's network and the purchase of retail services at a wholesale discount for resale to end users.
- This distinction is crucial to promote facilities-based competition which is the only sustainable form of competition.
- The unlimited availability of the UNE-P at TELRIC rates would discourage competitive investment in facilities and force continued reliance on the ILEC's facilities, which in turn would deprive consumers of the choice, innovative services, and service quality that facilities-based competition makes possible.

- Providers of the UNE-P would simply rebrand ILEC services, making such providers, in essence, a sales team for the incumbent

MEANS OF PRESERVING STATUTORY DISTINCTION BETWEEN UNES AND RESALE

- Almost all new entrants must obtain bottleneck UNEs, such as unbundled loops, from the ILECs.
- Preservation of the statutory distinction may be accomplished by establishing TELRIC pricing for such bottleneck facilities, but not for non-bottleneck facilities such as switching and transport.
- The distinction may also be preserved, as Bell Atlantic has committed to do at the urging of the New York Commission, by not providing the UNE-P in Central Offices where two or more competitors are collocated and by imposing geographic, market segment and sunset restrictions.

**Federal Communications Commission
Common Carrier Bureau Forum:
Combinations of Unbundled Network Elements**

**Panel One: THE IMPORTANCE OF COMBINATIONS OF
UNBUNDLED NETWORK ELEMENTS**

**R. Gerard Salemmme
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The Key to Sustainable Competition

Facilities-based competitors offer the greatest potential to deliver sustainable, differentiated local competitive telephone service to American consumers. Facilities-based competitors construct their own networks so that they can offer true, physical alternatives to the incumbent local exchange carriers ("ILECs"). Because facilities-based providers operate their own networks, they can offer consumers customized service packages, better quality services and better prices than the ILECs and thus offer the best hope for meaningful, lasting competition to the incumbent local carrier.

Since passage of the Telecommunications Act of 1996, facilities-based new entrants have raised approximately \$18 billion to invest in the provision of local exchange services. Because of the substantial cost and time involved in building out facilities to reach a large number of customers, facilities-based providers' use of combinations of unbundled network elements to "fill in" their networks facilitates quicker

initial local market entry by such new entrants. Consumers are thus able to obtain a greater choice of carriers more quickly through the use of combinations of unbundled network elements ("UNEs") and carriers' facilities.

Facilities-based providers may use combinations of UNEs to fill in their networks in a number of ways. For example, a facilities-based provider may use extended links (i.e., unbundled loops combined with transport) to gain access to unbundled loops from an ILEC's central office(s) in which the provider is not collocated. New entrants may thus gain access to bottleneck loops in a wide geographic area prior to going through the often costly and time consuming process of collocating their equipment in numerous ILEC central offices.

Regulatory commissions are beginning to recognize the importance of extended links as a means to allow competitors to more quickly enter the local market. For example, under the guidance of the New York Commission, Bell Atlantic in its pre-filing statement in New York has committed to provide extended links to competitors in New York. Similarly, an administrative law judge ("ALJ") has recommended in a recent arbitration decision that the Pennsylvania Public Utility Commission order Bell Atlantic to provide extended links to NEXTLINK in Pennsylvania.

Statutory, Regulatory and Judicial Authority RE: Combinations

Section 253(c)(3) of the '96 Telecommunications Act requires ILECs to allow new entrants to purchase, on an unbundled basis, separate elements of the ILECs' network at just, reasonable and non-discriminatory rates, terms and conditions and based on cost; this provision was intended to permit facilities-based competitors to fill in

portions of their networks with individual or combined network elements rather than to act as a lower-priced substitute for ILEC resold services. In contrast, Section 254(c)(4) of the Act requires ILECs to offer new entrants their retail exchange services at wholesale rates.

The Federal Communications Commission ("FCC") adopted rules implementing Section 253(c)(3). Pursuant to these rules, new entrants could order any combination of unbundled network elements, including combinations essentially identical to resold services. Subsequent FCC orders, such as the shared transport order, indicated that ILECs' provision of certain existing combinations that replicate resold services should be priced at forward-looking cost (i.e., below the price scheme established by Congress for resold services per 254(c)(4)).

The U.S. Court of Appeals for the Eighth Circuit subsequently ruled that the FCC could not require the provisioning of already combined elements which resemble resold services at cost-based rates because this would essentially obliterate the distinctions that Congress made between access to unbundled network elements under Section 253(c)(3) and the purchase at wholesale rates of an ILEC's retail services for resale under Section 253(c)(4). The Regional Bell Operating Companies ("RBOCs") have misconstrued the Eighth Circuit's decision to mean that they do not have to provide at cost-based rates any combination of unbundled network elements, including those that are not functionally equivalent to resold services. The Association for Local Telecommunications Services ("ALTS") has asked the U.S. Supreme Court to rule that the Eighth Circuit's opinion (striking down the requirement that ILECs recombine network elements at cost-based

rates) applies only to combinations that replicate resold services and not to any of the many other combinations of network elements that do not replicate resold services.

Statutory Distinction Between UNEs and Resale

The distinction that Congress has made between access to UNEs at cost to "fill in" a facilities-based competitor's network and the purchase of retail services at a wholesale discount for resale to end users is crucial to promote facilities-based competition which is the only sustainable form of competition. The unlimited availability of the UNE Platform ("UNE-P") at TELRIC rates would discourage competitive investment in facilities and force continued reliance on the ILECs' facilities, which in turn would deprive consumers of the choice, innovative services, and improved service quality that facilities-based competition makes possible. Providers of the UNE-P would simply rebrand ILEC services, making such providers, in essence, a sales team for the incumbent. In contrast, facilities-based competitors construct their own networks so that they can offer true, physical alternatives to the ILEC. Because facilities-based providers operate their own networks, they can offer consumers customized service packages, better quality services and better prices than the ILEC. Facilities-based entrants, therefore, offer the best hope for meaningful, lasting competition to the incumbent local carrier.

Means of Preserving Statutory Distinction Between UNEs and Resale

Almost all new entrants must obtain bottleneck UNEs, such as unbundled loops, from the ILECs. Preservation of the statutory distinction made by Congress between

access to UNEs to fill in facilities-based carriers' networks and the ability to purchase retail services at a wholesale discount may be accomplished by establishing TELRIC pricing for bottleneck facilities, but not for non-bottleneck facilities such as switching and transport. The distinction may also be preserved, as Bell Atlantic has committed to do at the urging of the New York Commission, by not providing the UNE-P in Central Offices where two or more competitors are collocated and by imposing geographic, market segment and sunset restrictions as well as "glue" charges on the UNE-P.